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CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 615

STEWART DIE CASTING CORPORATION,
A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF STEWART DIE CASTING CORPORATION, A CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SILAS H. STRAWN,
FRANK H. TOWNER,
Counsel for Petitioner.

THE DUNLOP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION OF STEWART DIE CASTING CORPORATION, A CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Stewart Die Casting Corporation, a corporation, submits this petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, and files herewith a certified copy of the entire transcript of record in said cause, and its brief in support of this petition. The decision of the Court of Appeals is not yet reported but appears at pages 1688 to 1705 of the printed record. That decision sustained in part a Decision and Order of the National Labor Relations Board, Respondent herein.

Summary Statement of the Matter Involved.

The evidence taken in the hearings before the Respondent is voluminous, and includes three volumes of printed record together with numerous exhibits which are certified to this Court as originals (R. 1723). Much of this material has no bearing upon the questions presented by this petition. In stating the matter involved, we shall therefore confine ourselves to a statement of those matters which do relate to the questions presented herein.

The order of Respondent here involved was entered on August 22, 1939 (R. 1611) and amended on August 23, 1939, (R. 1662). It was made in two cases pending before Respondent, one entitled "In the Matter of Stewart Die Casting Corporation and United Automobile Workers of America, Local 298," Case No. C-195, subsequently numbered as Case No. C-577, and the other entitled "In the Matter of Stewart Die Casting Corporation and Bernice Andrews, *et al.*," Case No. C-688, subsequently numbered as No. C-869. These cases were consolidated (R. 1591), but no attention need be given to Case No. C-688 (No. C-869) as all the matters dealt with in this petition arose in the other case.

In Case No. C-195 (No. C-577) the complaint, issued on January 4, 1938 (R. 29-35), was based upon a second amended charge (R. 37-40) dated January 4, 1938, and filed with Respondent by United Automobile Workers of America, Local 298 (hereinafter called the "Union"). This charge, in addition to allegations that Petitioner was guilty of various violations of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. A. Sec. 151, *et seq.*; hereinafter called the "Act"), alleges that a strike started at Petitioner's plant on or about March 16, 1937, and that Exhibit "A", attached to the charge is a list of persons who were working in Petitioner's plant prior to March

16, 1937, and "who either have been refused reinstatement or reemployment by the Company following the strike, or have been reemployed but without reimbursement for loss of pay or reinstated to their former positions in the plant" (R. 37, 38).

Upon the basis of this charge, Respondent issued its complaint herein on January 4, 1938 (R. 29, *et seq.*). In addition to the usual jurisdictional averments, the complaint alleges that on March 16, 1937 certain of Petitioner's employees went on strike; that on that date Petitioner locked out the remainder of its employees, and that the unlawful refusal of Petitioner to bargain collectively with the Union caused Petitioner's employees to remain on strike (R. 31). Paragraphs 9, 10 and 11 of the complaint name 183 individuals, dividing them into three classifications.

Paragraph 9 (R. 31-33) lists 146 individuals, alleges that they participated in the strike and that Petitioner, on June 24, 1937 and thereafter failed and refused to reinstate them in their employment. This paragraph was subsequently amended by the addition of 11 names, certain corrections in spelling, and the elimination of 14 names (R. 41, 42). Paragraph 10 (R. 33-34) lists 37 individuals, alleges their participation in the strike, and that they had not been reinstated to their employment by Petitioner from June 24 until the dates set opposite their respective names. This paragraph was subsequently amended by the addition of 16 names and by certain corrections in the original list (R. 43). Paragraph 11 (R. 34) lists 8 individuals who are also listed in paragraph 10, and alleges that they were discharged by Petitioner on the dates set opposite their respective names, and have not been thereafter reemployed by Petitioner. This paragraph was subsequently amended by the addition of 35 names and by certain corrections in the original list.

Respondent also undertook to amend the list of names at-

tached to the second amended charge upon which the complaint was issued, the charge being attached to the complaint, but only by adding 15 names thereto (R. 45). As amended, the charge lists 197 persons, all of whom are also listed in the amended complaint. Thus, paragraph 9 of the amended complaint lists 143 persons, paragraph 10 lists 53 persons, and paragraph 11 lists 43 persons, all but one of those listed in paragraph 11 being also listed in paragraph 10.

With respect to all individuals thus listed, the complaint alleges that Petitioner either refused to employ them after the strike or, having reemployed them, had subsequently discharged them because they joined and assisted the Union (R. 34). In this respect, the complaint is not in accordance with the second amended charge on which it is based, since the charge, even as amended, does not allege any violation of law by Petitioner through the discharge of any person subsequent to the strike. Paragraph 11 of the complaint as amended, however, alleges such a discharge of 43 individuals.

Petitioner's answer to the complaint (R. 48-49) generally denies all its allegations and sets up the inadequacy of the second amended charge as a basis for the issuance of the complaint. The hearings before Respondent occupied the period from January 20, 1938 (R. 53) to February 9, 1938 (R. 1256) and thereafter, on March 12, 1938 (R. 1257) and on May 19, 1938 (R. 1266), Respondent took the testimony of three witnesses by deposition.

The evidence shows that Petitioner is a Delaware corporation incorporated on October 5, 1917 and that it operated a plant at 4535 Fullerton Avenue, Chicago. Its business was the production of metal castings, tools and similar products. Certain facts with respect to its business were stipulated (R. 50-52) and the case does not present any question of jurisdiction.

Prior to March 17, 1937, Petitioner's officials had no knowledge of the union affiliations, if any, of its employees, and membership or non-membership in a union was not a condition of employment (R. 946, 1050). There is no evidence that prior to March 12, 1937, any of Petitioner's employees had ever been members of a union. About March 12, 1937, an organizer of the Union named Brown first undertook the organization of Petitioner's employees (R. 127, 1619).

About midnight of March 15, 1937, the employees then composing the night shift in the cleaning department decided to and did stage a sit-down strike (R. 953, 72, 156, 176, 186, 208, 255). This action was taken without notice to any officer of Petitioner, although earlier in the evening of March 15, 1937, there had been some rumors which had caused Petitioner's officers to go to the plant during the evening (R. 952, 953, 956). The men who started the sit-down strike were joined by men who were then working in other departments (R. 156, 157, 208), although some who were in the plant when the strike started thereafter left (R. 157, 188, 191). The statements as to the number of sit-down strikers varied from 75 to 150 (R. 156, 176, 186, 954), and the Decision and Order of Respondent states the number as approximately 150 (R. 1619).

The apparent cause of the sit-down strike was the dissatisfaction of individual employees with respect to certain things that had happened (R. 157, 158, 171-176, 205, 208) and they promoted the strike (R. 154, 169). No complaints or demands for union recognition had been made to officers of Petitioner prior to the sit-down strike (R. 952, 956, 1020, 1021, 184, 187, 202). The Union made no claim that it approached Petitioner prior to March 16, 1937, while the sit-down strike was in progress (R. 128), and Respondent did not find that that strike occurred during a pending labor dispute or that it resulted from any unfair

practice of Petitioner. On the contrary, it found that Petitioner's first violation of the Act was a refusal to bargain on March 23, 1937 (R. 1628), which refusal was found to be the cause of the continuance of the strike from and after that date (R. 1632).

The announced purpose of the sit-down strike was to stop production in the plant (R. 163), the strikers having taken possession of the lower floor of the plant (R. 1023, 1024) and barricaded the door (R. 163, 956). The strikers held possession of the lower floor of Petitioner's plant until the early morning of March 17, 1937, when they were ejected by the Chicago police (R. 156, 164, 211, 956, 957). To gain entry, the police were compelled to break down the door which had been barricaded by the strikers (R. 164, 956, 1038, 1039, 1068, 1069), but the strikers left peaceably when ordered to do so (R. 957).

During the day the strikers had possession of the plant, Petitioner's representatives made numerous unsuccessful efforts to get them to leave (R. 178, 179, 184, 1024, 1025, 1097, 1098). When the day shift came to work on the morning of March 16, 1937 they were sent home by Petitioner's officers and told that they would be notified when to return (R. 1021, 1022, 1066). This action was taken at the request of the Chicago police (R. 954, 955).

Upon the ejection of the strikers in the early morning of March 17, 1937 Petitioner closed its plant for the purpose of checking over its machinery, stock on hand, etc., to be sure that no damage had been done, and kept the plant closed until March 25, 1937 (R. 957). On that date, Petitioner reopened its plant and from then on did what it could to secure the return of its employees to work. It circulated an offer to its employees advising them that those who returned prior to April 5, 1937, would be paid for the time between March 16, when the sit-down strike occurred, and the date they returned to work (R. 972, 1006,

1007, 1029) and would also be given an increase in wages which had been decided upon prior to the sit-down strike (R. 1030, 1035). As a result of this offer many employees of Petitioner, including some of the sit-down strikers, returned to work (R. 191, 192).

The balance, however, stayed on strike and picketed Petitioner's plant, and as a result of their refusal to return to work, Petitioner was compelled to hire enough new employees to carry on its necessary activities (R. 1029). The strike was carried on from March 17 until June 24, 1937, and during that period a number of conferences were held between Petitioner and representatives of the Union and of its employees. Petitioner had enough employees, including those who had returned to work and those newly employed, to carry on its operations and did so (R. 972, 973). During the week of June 21, 1937 a series of conferences were held, culminating in an agreement on June 24, 1937, under which agreement the strike was settled (R. 263-275, 353-366, 1207-1210). Upon the making of this settlement, the pickets at Petitioner's plant were withdrawn on June 25, 1937 (R. 318) and the strike was considered settled.

Respondent's Decision and Order herein was made on August 22, 1939 (R. 1611, *et seq.*), and amended on August 23, 1939 (R. 1662). It is entitled in both cases before Respondent, and includes a statement of the case (R. 1612-1616), findings of fact (R. 1616-1654), conclusions of law (R. 1654, 1655), and an order (R. 1655, *et seq.*). Attached thereto as Appendices A, B and C, are three lists of named persons (R. 1659-1662). Generally speaking, the Decision and Order of Respondent decided all issues against Petitioner.

It requires Petitioner to cease and desist from certain activities (R. 1655, 1656) and makes a number of affirmative requirements. One requirement is that Petitioner offer immediate and full reinstatement to 154 named per-

sons (R. 1656), and upon application, to all employees of Petitioner who were on strike on March 23, 1937, and who have not been reinstated (R. 1657, 1658), placing those for whom employment is not available upon a preferential list. This requirement makes no distinction between those who engaged in the sit-down strike and those who did not, nor between those listed in the amended charge and amended complaint and who testified, and those who were not so listed and concerning whom there was no testimony. It grants to all persons on strike on March 23, 1937, and who have not been reinstated and to all persons listed in Appendix B to the Decision and Order a relief not asked in the charge upon which the complaint was based, and finds the discharge by Petitioner of those listed in Appendix B to be a violation of law, although that charge did not allege such a violation.

A second requirement is that Petitioner make various payments to 165 named persons, without regard to whether or not they engaged in the sit-down strike (R. 1656, 1657). This requirement also confers upon the persons listed in Appendix B to the Decision and Order a benefit not asked for in the charge upon which the complaint was based, the benefit being granted because of a discharge not alleged in the charge to be a violation of law.

A third requirement is that Petitioner make certain payments, under stated circumstances, to all of its employees who were on strike on March 23, 1937, and who have not been reinstated (R. 1658). This requirement also makes no distinction between those who did and those who did not engage in the sit-down strike. It also runs in favor of persons not named in the complaint or the charge upon which it was based, who are not identified in the evidence or in the Decision and Order, and concerning whom there is no testimony whatsoever in the record.

Upon the making of this Decision and Order, Petitioner

filed its petition in the Circuit Court of Appeals for the Seventh Circuit to annul and set aside the Decision and Order (R. 2-19). Respondent filed an answer to that petition (R. 20-28) with which it joined a prayer for enforcement of the Order (R. 28). The decision of the Court of Appeals (R. 1688-1705) was handed down on July 3, 1940.

The Court of Appeals sustained the requirement that Petitioner offer reinstatement to the sit-down strikers and give them back pay, on the grounds that Petitioner did not discharge the sit-down strikers, that it did not discriminate against them in reemployment, and that all of them were not identified in the record (R. 1697, 1698). The Court of Appeals sustained the requirement that Petitioner offer reinstatement to all persons who were on strike on March 23, 1937, and who had not been reinstated, and give them back pay under certain conditions, upon the ground that since Respondent had found that Petitioner's refusal to bargain with the Union caused the continuance of the strike, the proper remedy for such violation of law was reinstatement and reimbursement for those affected by such unfair labor practices (R. 1699). The Court of Appeals also sustained the requirement that Petitioner offer a second reinstatement and give back pay to the persons listed in Appendix B to the Decision and Order, on the ground that Respondent had power to take cognizance of an unfair labor practice occurring after the filing of the complaint (R. 1700).

Statement of the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Decree in Question.

This Court's jurisdiction to issue the writ of certiorari prayed for herein is established by Section 240 of the Judicial Code as amended (U. S. C. A., Title 28, Sec. 347), which reads in part as follows:

> "In any case, civil or criminal, in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether governmental or other litigant, to require by certiorari either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error on appeal."

After providing for review in certain cases by writ of error or appeal, the same section of the statute further provides:

> "No judgment or decree of a Circuit Court of Appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than is provided in this section."

Sections 10(e) and 10(f) of the Act (49 Stat. 449; 29 U. S. C. A., Secs. 151, *et seq.*) also provide for the review, upon writ of certiorari, of the decision of the Court of Appeals herein. Section 8 of the Act of February 13, 1925 (U. S. C. A., Title 28, Sec. 350) provides in part as follows:

> "No writ of error, appeal or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

The decision of the Court of Appeals herein was handed down on July 3, 1940 (R. 1688). Petitioner filed its petition for rehearing in the Court of Appeals on July 18, 1940 (R. 1705) and that petition was denied on October 18, 1940 (R. 1711). The decree of the Court of Appeals (R. 1712-1717) was entered on October 29, 1940. This petition is therefore filed within the three months following the denial of Petitioner's petition for rehearing in the Court of Appeals and the entry of a decree in that Court.

The Questions Presented.

Petitioner presents three questions for decision in this case as follows:

1. May Petitioner be required to offer reinstatement and make payments to those of its former employees who engaged in the sit-down strike on March 16, 1937.

2. May Petitioner be required to offer reinstatement and make payments to the 41 persons listed in Appendix B to Respondent's Decision and Order, since the charge upon which the complaint herein was based did not complain of the discharge of these persons subsequent to their reemployment by Petitioner, and charged no violation of law by reason of such discharge.

3. May Petitioner be required to offer reinstatement to all of its employees who were on strike on March 23, 1937, and who have not been reinstated, and under some circumstances, to make payments to them, since such persons were not listed in the charge or complaint, were not identified by name or otherwise, there were no allegations in their behalf of law violations by Petitioner, and there was no evidence in the record relating to them.

Reasons Relied Upon for the Allowance of the Writ.

The reasons relied upon by Petitioner for the allowance of the writ herein are:

1. In sustaining the requirement of the Decision and Order that Petitioner offer reinstatement and make payments to the participants in the sit-down strike, the Court of Appeals has decided a federal question in a way probably in conflict with the decisions of this Court, and in conflict with a decision of the Circuit Court of Appeals for the Third Circuit on the same matter.

2. In sustaining the requirement of the Decision and Order that Petitioner offer reinstatement and make certain payments to the persons listed in Appendix B to said Decision and Order, the Court of Appeals has decided an important question of federal law which has not been but should be definitely settled by this Court, and has made a decision in conflict with decisions of the Circuit Courts of Appeal for the Second and Sixth Circuits on the same matter.

3. In sustaining the requirement of the Decision and Order that Petitioner should offer reinstatement and under some conditions, make payments to all of its employees who were on strike on March 23, 1937, and who have not been reinstated, the Court of Appeals has decided an important question of federal law which has not been but should be definitely settled by this Court, has made a decision in conflict with decisions of the Circuit Courts of Appeal for the Second, Fifth and Sixth Circuits on the same matter, and has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by Respondent as to call for an exercise of this Court's power of supervision.

WHEREFORE Petitioner prays that this petition for a writ of certiorari directed to the United States Circuit Court

of Appeals for the Seventh Circuit may be granted, and that this Court proceed as is provided by law and the rules of this Court in such cases, and that upon final hearing the judgment of the Circuit Court of Appeals for the Seventh Circuit upon the matters herein specified be reversed.

Respectfully submitted,

SILAS H. STRAWN,
FRANK H. TOWNER,
Counsel for Petitioner.

FILED
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MAY IT PLEASE THE COURT:

As appears from the petition filed herein by Petitioner, three questions are presented for decision. We shall deal with these matters in order.

1. As stated in the petition, the Decision and Order of Respondent made herein extends the right to reinstatement and back pay to those employees of Petitioner who engaged in the sit-down strike at its plant on March 16, 1937. This was done because, as stated by Respondent (R. 1638), the sit-down strike was devoid of violence, the strikers evacuated the plant promptly when the police entered, the sit-down strikers were not discharged, and when Petitioner's plant was reopened, there was no discrimination against the sit-down strikers in giving reemployment.

The Court of Appeals sustained this conclusion of Respondent (R. 1697, 1698, 1713-1715) on the grounds that the sit-down strikers were not discharged, although they might have been, and that since they were not discharged, the decision of this Court in *Labor Board* v. *Fansteel etc. Corp.*, 306 U. S. 240, was not controlling; that they were reinstated without discrimination because of their participation in the sit-down strike; and that with the exception of 12 or 14 persons who admitted their participation in the strike, the identity of the sit-down strikers did not appear, the burden of proving their identity resting upon Petitioner.

The facts are correctly stated in the Decision and Order of Respondent and the Opinion of the Court of Appeals, but we submit that these facts do not support the conclusions reached. In the *Fansteel Corporation* case, 306 U. S. 240, those who actually participated in the sit-down strike were discharged, but this Court did not hold that to be the essential fact in determining their right to reinstatement. The holding made (p. 258) was that the reinstatement of the sit-down strikers would not effectuate any purpose of the Act. As stated by this Court (p. 259) the respondent there "stood absolved by the conduct of those engaged in the 'sit-down' from any duty to reemploy them."

That also was the ground upon which this Court refused the right of reinstatement to 14 persons who did not participate in the sit-down strike and who were not discharged (p. 259) but who aided and abetted the sit-down strike. This Court held (p. 261) that notwithstanding the failure to discharge them, the aiders and abetters were in no better case than the sit-down strikers, and that there was no policy of the Act justifying the Board in requiring their reinstatement.

This Court's decision was followed and applied in *McNeely etc. Co.* v. *Labor Board*, 106 Fed. (2) 878 (3rd

Cir.). In that case, it appeared that the sit-down strikers were not discharged (p. 879) and that they did not resist a court injunction to vacate (p. 880). For these reasons, the Board argued that the decision of this Court in the *Fansteel Corporation* case, 306 U. S. 240, was not controlling. The court, however, held that under the decisions of this Court, such a discharge was not necessary, concluding (p. 880) that the reinstatement of the sit-down strikers could not be required by the Board since it could not effectuate any purpose of the Act.

The reinstatement of some sit-down strikers without discrimination was also held by this Court in the *Fansteel Corporation* case, 306 U. S. 240, to confer no rights upon such strikers. In that case, some of the sit-down strikers were reemployed without discrimination, subsequent to the sit-down strike, but this Court held (p. 259) that such action did not alter the Company's rights, and that in reemploying some of the sit-down strikers, it was only exercising its normal right to select its employees.

Thus, on these matters the decision of the Court of Appeals herein seems to be in direct conflict with the decisions in the *Fansteel Corporation* case and the *McNeely* case. It is difficult to understand its action, since it made the decision on these matters (98 Fed. (2) 375) which was sustained by this Court in the *Fansteel Corporation* case.

The Court of Appeals also upheld the awards to the sit-down strikers because all of them were not identified in the evidence. It held (R. 1698) that the burden of showing their identity rested upon Petitioner as a matter of defense, and that all of Petitioner's employees should not be deprived of the benefits of the Act because certain undisclosed ones forfeited their rights. We submit that this conclusion is not supported by law or reason.

In this case Respondent was the real complainant. In

its complaint and in the evidence which it offered, it asserted rights which it claimed were vested in the persons named in the charge and complaint, and charged Petitioner with divers violations of law to the prejudice of those rights. It certainly had the burden of proving the existence of the asserted rights, and the commission by Petitioner of the asserted law violations which prejudiced those rights. It was under obligation to produce evidence sufficient to "justify, if the trial were to a jury, a refusal to direct a verdict." *Labor Board* v. *Columbian Co.*, 306 U. S. 292, 300.

As part of its case, Respondent proved the fact of the sit-down strike. Under the law as it was then and is now, those who participated in that strike thereby lost their rights as employees, and consequently were not entitled to reinstatement or back pay. These things being so, it would seem clear that if there was a burden of proof, the burden was upon Respondent to prove that those for whom it sought a recovery were not barred from such a recovery through the loss of their status as employees by participation in the sit-down strike. Such burden has been held to rest upon Respondent. *Labor Board* v. *Carlisle Lbr. Co.*, 99 Fed. (2) 533, 537, 538. Had the trial been to a jury, the lack of such proof would have required a directed verdict for Petitioner.

It is significant that in its Decision and Order, Respondent did not assert Petitioner's failure to identify the sit-down strikers as a justification for its inclusion of those strikers among those entitled to benefits. So far as concerns this circumstance, the facts in this case are substantially the same as in the *Fansteel* case. The Court of Appeals' opinion in that case (98 Fed. (2) 375) states (p. 377) that originally about 100 unknown persons occupied the Company's plant; and indicates that of this number only 66 were subsequently identified (p. 378). The

condemnation of the sit-down strikers nevertheless ran against all of them, whether known or unknown.

Nor would the elimination of the sit-down strikers from those entitled to the benefits of Respondent's Decision and Order deprive any employee who did not participate in that strike of any of his rights. If reinstatement and back pay were confined to those persons who did not engage in the sit-down strike, those entitled to those benefits could secure them upon a showing that they did not thus engage. Nor would any improper burden thus be cast upon them or Respondent. A recovery is sought in their behalf, and it is only fair that proof of their right to that recovery be supplied.

In any case, there were at least 11 persons who testified affirmatively that they did participate in the sit-down strike (R. 157, 211, 256, 286, 302, 422, 484, 526, 611, 655, 917). Under the decision of this Court in the *Fansteel Corporation* case, *supra*, these persons, at least, are not entitled to reinstatement and back pay.

2. As stated in the petition filed herein, Appendix B to Respondent's Decision and Order (R. 1661) lists 41 individuals who went on strike, presumably on March 16, 1937 or thereafter, were subsequently reinstated by Petitioner, and thereafter discharged, the dates of reinstatement and subsequent discharge being shown in Appendix B. The Decision and Order awards to each of these persons the right to back pay from June 24, 1937 up to the date of his reinstatement, and also the right to a second reinstatement and to back pay from the date of his discharge to the date upon which reinstatement is again offered or he is placed upon a preferential list. The Court of Appeals sustained this requirement (R. 1700, 1713, 1714), apparently upon the theory that the discharge of these persons upon the dates shown in Appendix B (R. 1661, 1716, 1717) was an unfair labor practice occurring after

the filing of the complaint, and of which Respondent could take cognizance.

The fact is that with the exception of Fisher and Zukowski, all of the persons listed in Appendix B and who had been re-employed after the strike ended, had again been discharged before the issuance of the complaint herein (R. 36) and before the filing of the charge upon which that complaint was based (R. 38). Fisher is not mentioned anywhere in the pleadings. Chocin, Kranz and Schupolsky were not listed in the original charge, but were added by amendment (R. 45). All the rest were listed in the original charge (R. 38-40). Thus, if the discharges were violations of law, in all but two instances the violations had occurred prior to the filing of the charge and issuance of the complaint. Decisions which give Respondent authority to deal with an unfair labor practice occurring subsequent to the filing of the charge but growing out of matters dealt with therein, have no application to the point which we now make. See *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 369.

Our point is that since the second amended charge upon which the complaint herein was based did not allege that the discharge of these individuals by Petitioner, subsequent to their re-employment, was a violation of law, or that by reason of such discharges, Petitioner was under any obligations to those persons by way of reinstatement and back pay, Respondent had no authority or jurisdiction to include such allegations in the complaint and proceed to judgment upon them. Moreover, we contend that Respondent had no jurisdiction to amend the charge by adding Chocin, Kranz and Schupolsky to the list attached to the charge, nor to make an order in favor of Fisher, who was not listed in the charge or complaint, even as those documents were amended.

Section 10 of the Act prescribes the methods by which Respondent may prevent unfair labor practices and com-

pensate persons injured by such practices. In Section 10(a) Respondent is empowered to act "as hereinafter provided." In Section 10(b) Respondent is authorized to issue a complaint "whenever it is charged" that any person has violated the Act. The same section provides that such a complaint shall state "the charges in that respect."

This language confers no authority upon Respondent to originate a charge, to amend a charge after it has been filed, to issue a complaint in the absence of a charge, or to issue a complaint containing allegations of law violation arising out of a status existing when the charge was filed, if the charge upon which the complaint is based does not contain such allegations. In *Labor Board* v. *Hopwood Retinning Co.*, 98 Fed. (2) 97 (2nd Circ.) it was held (p. 101) that under the Act, the filing of a charge is a required preliminary to the issuance of a complaint and to the attaching of the jurisdiction of Respondent; that the complaint and hearing must be in accord with the charge in an attempt to prove or rebut such charges, and that Respondent cannot use its own initiative in respect to charging unfair practices.

In *Labor Board* v. *National Licorice Co.*, 104 Fed. (2) 655, the same Court of Appeals said (p. 658) that in the *Hopwood* case, *supra*, it had held that a charge is a condition precedent to Respondent's power to issue a complaint. In *Consumers Power Co.* v. *Labor Board*, 113 Fed. (2) 38 (6th Circ.) it was also held (p. 42) that no charge may be issued by Respondent until a charge has been filed with it, the Court saying that the filing of a charge is jurisdictional. The *National Licorice Company* case came to this Court and was decided at 309 U. S. 350. This Court mentioned this point without deciding it, saying at p. 369:

> "It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it."

Thus, the decision of the Court of Appeals on this point in the case at bar is not only based upon an erroneous assumption of fact, but in practice, is in conflict with decisions of the Courts of Appeal for the Second and Sixth Circuits upon the same point, which has not yet but should be decided by this Court. We submit that the decisions in the *Hopwood Company* case and *National Licorice Company* case are supported by reason.

Certainly, the Act requires a charge as a condition precedent to the issuance of a complaint, and this being so, it follows that Respondent has no authority to amend a filed charge. Therefore, it is only logical that a complaint must be limited, so far as conditions then existing are concerned, to matters set up in the charge. If this is not so, Respondent would have the right to initiate a complaint on a charge made by it, on the basis of facts existing when a charge is filed, without having a charge as a basis therefor, thus nullifying the express requirement of the Act that a charge be filed as a condition precedent to the issuance of a complaint.

3. As stated in the petition filed herein, the Decision and Order of Respondent awards a right to reinstatement and, under stated conditions, back pay to all employees of Petitioner who were on strike on March 23, 1937 and who have not been reinstated (R. 1657, 1658). This award runs in favor of persons who are not identified in the record by name or otherwise, who did not testify and concerning whom, as individuals there is no evidence whatsoever in the record. The Court of Appeals sustained this requirement, apparently upon the assumption that our only objections to it were that the required reinstatement and back pay were not issues tendered by the charge and the complaint, and that the beneficiaries of the requirement had ceased to be employees of Petitioner (R. 1699, 1715).

But these were not our only objections to the requirement. We do not now take the position that all persons

on strike on March 23, 1937 were not employees of Petitioner. We do maintain that if these unidentified persons were to be granted rights, the charge filed with Respondent should have named them and contained charges on their behalf; and that the complaint issued by Respondent should have identified them and contained allegations in their behalf. We also maintain that the record should contain some evidence sustaining an award to them; and that since none of these things are so, the requirement is beyond the authority of Respondent.

In this case, both the complaint and the charge upon which it was based dealt only with the parties named therein. In the charge, only those persons listed in Exhibit A (R. 38-40, 45) are alleged to have been refused reinstatement and back pay (R. 37). The complaint only alleges that the persons named in paragraphs 9, 10 and 11 thereof (R. 31-34) were denied reinstatement. Neither document alleges such violations of law with respect to persons other than those named. Upon the theory that the issues, so far as they related to individuals, were confined to the persons so named, objections were sustained to evidence offered by Petitioner in the proceedings before Respondent, and which was pertinent if the proceeding involved all strikers. The sole reason for sustaining the objections was that the evidence related to parties not named in the complaint and who did not testify (R. 1199, 1201, 1221, 1223).

Moreover, the motion of Petitioner to dismiss the proceeding as to individuals named in the complaint but who did not testify (R. 1254) was sustained (R. 1255, 1256). All these rulings of the Examiner were sustained by Respondent (R. 1639), which also dismissed the proceeding as to persons named in the complaint but who did not testify (R. 1658, 1659). These actions of respondent were a practical application of the theory which we now advance

in connection with the awards to all unnamed persons who were on strike on March 23, 1937.

As we have argued, Respondent only acquires jurisdiction to issue a complaint when a charge is filed with it, and cannot issue a complaint with respect to a status existing when the charge is filed but not complained of therein. *Labor Board* v. *Hopwood, etc., Co.*, 98 Fed. (2) 97, 101; *Labor Board* v. *National Licorice Co.*, 104 Fed. (2) 655, 658; *Consumers Power Co.* v. *Labor Board*, 113 Fed. (2) 38, 42.

We also submit that Respondent cannot award reinstatement and back pay to persons not named in a complaint. It is true that in *Republic Steel Corp.* v. *Labor Board*, 107 Fed. (2) 472 (3rd Circ.), the Court held that reinstatement could be required, even though the issue was not tendered in the complaint (p. 478). But it does not appear from that decision that the complaint did not name those whose reinstatement was required, and we submit that in any case, the decision is not correct on this point. In *Globe Cotton Mills* v. *Labor Board*, 103 Fed. (2) 91 (5th Circ.), the Court set aside a requirement of Respondent on the ground that the complaint contained no charge on which the requirement could be based, holding (p. 93) that Respondent may not issue an order touching a matter not complained of. We submit that this is the correct rule and is supported by every consideration of fairness and justice.

It would seem plain that Petitioner was entitled to know to whom it might be required to grant reinstatement and, under stated conditions, back pay. It would seem that it should have been advised by the charge and complaint of the identity of those having claims and of the character of those claims. But it has not been so advised by the charge, the complaint, the evidence, or the order. There is even considerable doubt that the identity of those employees

who were on strike on March 23, 1937, could be proven, for Petitioner's plant was then closed and did not reopen until March 25 (R. 957) when all employees were told that those who returned before April 5, 1937, would be paid for the time the plant was closed (R. 972, 1006, 1007, 1029). This general requirement has been contained in orders of Respondent which have been sustained, but in no such case was the requirement specifically contested.

The impropriety of the procedure which has been followed has deprived Petitioner of a substantial right. Respondent has no authority under the Act to require the reinstatement of those strikers who have obtained substantially equivalent employment elsewhere. *Mooresville, etc., Mills* v. *Labor Board,* 94 Fed. (2) 61, 66 (4th Circ.), 97 Fed. (2) 959, 961; *Labor Board* v. *Carlisle Lbr. Co.,* 99 Fed. (2) 533, 537, 538 (9th Circ.); *Phelps Dodge Corp.* v. *Labor Board,* 113 Fed. (2) 202, 205 (2nd Circ.). And since such persons were not entitled to reinstatement, they were not entitled to back pay. *Labor Board* v. *Carlisle Lbr. Co.,* 99 Fed. (2) 533, 537 (9th Circ.); *Labor Board* v. *Hearst,* 102 Fed. (2) 658, 664 (9th Circ.). There is no proof in the record that these unnamed strikers had not, at the time of the hearings herein, secured substantially equivalent employment elsewhere, although the burden of proving their status as employees and their consequent right to reinstatement and back pay rested upon Respondent. *Labor Board* v. *Carlisle Lbr. Co.,* 99 Fed. (2) 533, 537. Had Petitioner known that Respondent intended to grant benefits to persons other than those named in the charge, in the complaint and in the evidence, it might have been able to prove that such persons were not entitled either to reinstatement or back pay because they had secured such substantially equivalent employment elsewhere.

As we have said the Decision and Order of Respondent actually applies the principles for which we contend. Objections to evidence offered by Petitioner were sustained

on the sole ground that it did not relate to persons named in the complaint. The complaint was dismissed as to 25 persons named therein for the sole reason that no evidence was presented in their behalf, and Bror Johnson, a named complainant (R. 39, 32) was refused the benefits of the Decision and Order because he had another job which paid him more money (R. 1642). Thus 25 persons named in the charge and complaint were denied the benefits of the Decision and Order because they did not prove through testimony their right to a recovery; while an unknown number of unnamed persons who also did not prove their right to a recovery, are granted the benefits of the Decision and Order. There is very little logic in such a result. And if the 25 persons as to whom the complaint was dismissed are nevertheless entitled to reinstatement under this requirement, the inconsistency of what has been done is still greater.

Conclusion.

From the foregoing it will be seen that with respect to the three questions here presented, the Court of Appeals in the case at bar has apparently departed from rules of law laid down by this Court, has certainly differed from decisions of other Courts of Appeal on similar matters, and with respect to the required reinstatement of all persons on strike on March 23, 1937, has certainly sanctioned a departure by Respondent from the usual course of judicial proceedings.

For all of these reasons, we submit that the writ of certiorari prayed for should be granted.

Respectfully submitted,

SILAS H. STRAWN,
FRANK H. TOWNER,
Counsel for Petitioner.

Office - Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 615

STEWART DIE CASTING CORPORATION,
A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SILAS H. STRAWN,
FRANK H. TOWNER,
Counsel for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

We wish to make a brief reply to the argument submitted by Respondent herein in opposition to our petition for a writ of certiorari. Many of the facts stated in Respondent's brief relate to issues which have not been presented to this Court, but we shall confine our reply to three points urged in the petition.

1. In support of the conclusion reached by the lower court with respect to the sit-down strikers here involved, it is said by Respondent (pp. 9-12, Resp. Br.) that the conclusion of the lower court should be upheld because Petitioner's objection to the granting of benefits to the sit-down strikers was not made before the Board and should not now be considered; because the record does not show the identity

of the sit-down strikers; and because of lack of violence in the sit-down strike and lack of damage resulting therefrom.

The suggestion that this point was not sufficiently raised in the proceedings before Respondent is an afterthought. It was raised generally in Petitioner's exceptions to the Intermediate Report herein (R. 1573). The filing of these exceptions was Petitioner's first opportunity to question the propriety of this requirement, which, notwithstanding the exceptions, was carried into the order of Respondent.

The lower court thought it had a right to pass on the matter, notwithstanding Section 10(e) of the Act, and its action in so doing was not and is not questioned by Respondent. In any case, the question is one of Respondent's power under the Act, which cannot be enlarged except by the Congress.

So far as concerns the obligation of Petitioner to identify the sit-down strikers, this matter was dealt with in our brief in support of our petition (pp. 3-5). So far as concerns the claim of non-violence in the sit-down strike and lack of damage resulting therefrom, we direct attention to the fact that the strike prevented the Company from operating, since the strikers seized the ground floor of the plant in which was located all of Petitioner's machinery and other essentials to operation (R. 1023, 1024). The strikers were not able to exclude Petitioner's officials from the plant, because those officials, having heard rumors that something was to take place (R. 953), had already taken possession of the upper part of the building where the offices were located (R. 1024).

Notwithstanding the occupation of these offices by Petitioner's officers, the sit-down strike did paralyze Petitioner's operations. The avowed purpose of the strike was to produce this result by stopping production in the plant (R.

163) and it had this effect (R. 977, 1012-1014) at a time when the plant was busy and Petitioner was extremely anxious to operate (R. 976). The occupation of Petitioner's plant actually compelled a shut-down for a week after the strikers were ejected and it is idle to suggest that such an occupation and enforced shut-down did not impose a damage upon Petitioner.

Such damage was just as real as any damage which would have resulted from physical injury to Petitioner's tools, machines, and other properties; and was certainly as extensive as that suffered in the *McNeely* case, 106 Fed. (2) 878. The sit-down strike was a violation of the Criminal Code of Illinois (Ch. 38, Ill. Rev. Stat., 1939), and those who participated therein should not be given rights under the law because their illegal act did not damage Petitioner as much as it might have done.

Nor was the termination of the sit-down strike as peaceful as is represented. To gain entrance to Petitioner's plant the police were forced to go through a door with axes (R. 164, 956) and the strikers only left because they were told to get out "or else" (R. 164). Nor is it important that there may not now be as many sit-down strikes in the country as formerly. The sit-down strike here involved is still of major importance to Petitioner, since the order of Respondent requires Petitioner to pay large sums of money to the sit-down strikers and to restore many of them to their employment with Petitioner.

2. With respect to the status of the persons listed in Appendix B to Respondent's Decision and Order it is only urged (pp. 12, 13, Resp. Br.) that the complaint issued by Respondent set forth no new unfair labor practice. This is contrary to the fact shown by the record. The particular discriminations alleged against Petitioner in the charge upon which that complaint was based were (R. 37) that Petitioner employed strike breakers; that it refused to dis-

charge them; that it refused to reinstate employees who were members of the union; and that it refused to reimburse reinstated employees who were members of the union for loss of pay, and reinstate them to their former positions in Petitioner's plant.

With respect to the persons listed in the charge, that document only alleges that those persons had either been "refused reinstatement or employment by the company following the strike, or have been reemployed without reimbursement for loss of pay or reinstated to their former positions in the plant." Nowhere in the charge is there any complaint that anybody, whether listed in the charge or not so listed, had been restored to his position subsequent to the strike, and had then been discharged as a result of an illegal act on the part of Petitioner. Yet that is the specific allegation of the complaint with respect to the 41 individuals listed in Appendix B to Respondent's Decision and Order.

Certainly, in awarding benefits to these persons, Respondent did more than elaborate "with particularity" an allegation already contained in the charge. On the contrary, it is perfectly obvious that the charge did not contain any allegations with respect to the discharge of these persons subsequent to their reemployment, and that such allegations first appear in the complaint itself.

3. With respect to the requirement of Respondent's Decision and Order that all persons on strike on March 23, 1937 should be offered reemployment and, under some circumstances, be given back pay, it is only suggested (pp. 13, 14, Resp. Br.) that this case is ruled by the decision in the *Republic Steel Corporation* case, 107 Fed. (2) 472, in which this Court granted certiorari on another point (301 U. S. 655). It is true that in that case it was held that reinstatement could be required, even though the issue was

not tendered in the complaint, and we so stated in our brief in support of our petition (p. 10).

The decision in the *Globe Cotton Mills* case, 103 Fed. (2) 91, 93, appears, however, to be to the contrary. Moreover, we do not base our claim that this requirement is invalid solely upon the ground that the issue was not presented by the complaint herein, which apparently was the only point upon which the court ruled in the *Republic Steel Corporation* case, 107 Fed. (2) 472. We complain of it also for the reason that the record herein contains no proof supporting any award whatsoever to the unnamed and unknown beneficiaries of this portion of Respondent's order (see pp. 10-12, Brief in Support of Petition). It requires no argument to demonstrate the invalidity of a requirement having no evidence at all to support it. The fact that such a requirement may have been sustained in other cases where its propriety was not drawn in question is not conclusive here.

We respectfully submit that the writ prayed for herein should be granted.

SILAS H. STRAWN,
FRANK H. TOWNER,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 615

STEWART DIE CASTING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court below (R. 1688–1705) is reported in 114 F. (2d) 849. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1611–1663) are reported in 14 N. L. R. B. 872.

JURISDICTION

The decree of the Court below (R. 1712–1719) was entered on October 29, 1940. The petition for

a writ of certiorari was filed on December 10, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. A question urged by petitioner, but which we think is not properly presented, is whether in the circumstances of this case the Board exceeded its power in ordering the reinstatement of employees who participated in a brief sit-down strike, where the employees engaged in no violence or destruction of property, promptly and peaceably evacuated the plant when requested to do so by peace officers, and were never discharged by the employer, but, on the contrary, were repeatedly solicited to return to work.

2. Whether the charge is, in certain respects, adequate to support the Board's complaint and order.

3. Whether certain reinstatement provisions of the Board's order are invalid because the employees covered thereby were not listed by name in the complaint.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings [1] the Board issued its findings of fact, conclusions of law, and order (R. 1611–1663). The findings of the Board, which were sustained by the Court below and are not challenged by the petition for certiorari, may be summarized as follows: [2]

At 1 o'clock a. m. on March 16, 1937, as the result of dissatisfaction with working conditions (R. 1619; 157–158, 171–175), approximately 150 employees on the night shift at petitioner's Chicago plant engaged in a sit-down strike (R. 1619; 156–159, 161–165, 176–180, 187–190, 953–957, 1023–1025). The sit-down was of brief duration, being terminated at 3 a. m. on the following day, March 17, when the Chicago police entered and evicted the strikers (R. 1619; 156, 955). Petitioner's officials were not excluded from the plant during the sit-

[1] There were two proceedings before the Board, numbered respectively, C–577 and C–869, which were consolidated by the Board for all purposes (R. 1591). The present petition for certiorari involves only No. C–577. The proceedings in C–577 were as follows: Amended charges filed by United Automobile Workers of America, Local 298, herein called the U. A. W. or the Union (R. 37–40, 45), complaint and notice of hearing (R. 29–36), answer (R. 46–50), hearing before a trial examiner, Intermediate Report of the trial examiner (R. 1549–1562), exceptions thereto (R. 1563–1576); and oral arguments before the Board (R. 1615–1616).

[2] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence. Jurisdictional facts are omitted, since no question as to jurisdiction is raised.

down (R. 1619; 178, 1024, 1069, 1097); there was no violence and no damage was done to the company's property during its occupation by the strikers (R. 1619; 156, 190, 957, 1066–1067); and the employees left peaceably when requested to do so by the police (R. 1619; 957). On the morning of March 16, 1937, when the employees on the day shift came to work they found the plant closed down and were advised by representatives of petitioner that the plant would remain closed for a few days (R. 1619; 955, 1022). These employees at once formed a picket line (Cf. R. 1636; 80–81). During the course of the day the U. A. W., which had had nothing to do with the calling of the sit-down strike, undertook to enlist members among the employees (R. 1619–1620; 166, 80); by March 22, 574 employees, a large majority of the approximately 685 employees in an appropriate bargaining unit,[3] had joined the U. A. W. (R. 1618, 1619; Bd. Exh. 7, R. 83–92, 127, 134, 167). On March 22, at a conference held between representatives of the U. A. W. and officials of the Company, the Union spokesmen informed petitioner that the U. A. W. represented a majority of the employees and requested petitioner to recognize it as the employees'

[3] The Board found the appropriate collective bargaining unit to consist of the hourly and piece-rate production and maintenance employees, excluding supervisory and office employees, draftsmen, and watchmen (R. 1617). The propriety of the Board's determination as to the bargaining unit has not been questioned at any stage of the proceeding and is not challenged by the petition for certiorari.

collective bargaining representative (R. 1620; 97, 107, 114, 243). Hellings, petitioner's president, stated that he would take the matter under advisement, and the meeting adjourned (R. 1620; 98, 959). The following day Hellings, completely ignoring the U. A.W., sent a mimeographed letter to each employee in which, after referring to the Union's request for recognition, he stated:

> Today I am replying to the Committee as follows:
>
> * * * * *
>
> So far as the presentation of any complaint is concerned, it makes no difference to me now or in the past whether they are presented by individuals or groups of employees. They will all be treated with equal courtesy and attention.
>
> Do not be led astray by any claim that we can be bullied or coerced by any labor organization—or that we are willing to enter into a horse-trading contract with any group who claim the ability to deliver free workmen at a price.

(R. 1621–1622; Bd. Exh. 8A, R. 986). Other portions of the letter impunged the motives of the leaders of the Union, to whom it referred as "agitators," and intimated that continued affiliation with the U. A. W. would result in the loss of the employees' jobs (*ibid.*). The Board found that Hellings' letter of March 23 constituted a refusal to bargain collectively with the U. A. W. (R. 1628).

Further refusals to recognize and to bargain collectively with the U. A. W. occurred on April 9, April 17, June 21, and June 24, 1937 (R. 1623–1629; 1205–1206, 1213, 1239, 1165–1170, 238–240, 249, Bd. Exhs. 10, 11A, 11B, 365, 355–357). The Board found that petitioner's refusal to bargain collectively on March 23 and thereafter served to prolong the strike in which petitioner's employees were engaged (R. 1632).

On March 25, petitioner reopened its plant (R. 1636; 64). Company representatives made strenuous efforts to induce the striking employees to return to work, seeking them out in their homes and on the picket line and offering them—including the employees who had participated in the sit-down (Pet. 6–7)—2 weeks pay for the time they had been on strike and a 10-percent wage increase (R. 1633; 1098–1101, 1123, 1125, 972, 1029–1030). These offers were accompanied in many instances by attacks on the U. A. W. by company officials and statements that petitioner would not enter into an agreement with the U. A. W. (R. 1633–1634; 781–782, 824–825, 1099, 1122, 113, 332, 455, 481, 579, 581). As a result of these tactics, some 348 of the strikers were induced to return to work (R. 1634). In addition, petitioner hired approximately 230 new employees to take the places of those who remained on strike (R. 1636). All these new employees were hired after March 23, 1937, the date of the first refusal to bargain collectively (*ibid.*).

At a conference between the U. A. W. and petitioner, held on June 21 and continued on June 24, the U. A. W. again demanded recognition as the collective bargaining representative of the employees, and also requested that the new employees hired during the course of the strike be discharged and the strikers reinstated immediately (R. 1625; 355–357, 365, 1005, 1208). Petitioner rejected both proposals (R. 1625; 355–357, 365, 1005, 1208). It agreed, however, that it would reinstate the striking employees if and when any vacancies occurred and that reinstatement would be in accordance with a list to be submitted by the U. A. W. (R. 1625–1626; 357–359, 361, 1210). The U. A. W. then called off the strike (R. 1636; 318). On June 26 the petitioner again sent a letter directly to its individual employees in which it denounced the strike as having been "due to ill-advised group hysteria rather than to any real reason," and stated that "It is not necessary for employees to join a union and burden themselves with dues and assessments in order to confer with and receive fair treatment from the Company" (R. 1634–1635; Bd. Exh. 14, 271, 973).

The Board found that petitioner's refusal on June 24, 1937, and thereafter, following the request of the U. A. W., to reinstate 113 named employees who had participated in the strike was based on "the fact that they were members of the U. A. W. and had engaged in concerted activities," and that

such conduct constituted discrimination in regard to hire and tenure of employment and discouraged membership in the U. A. W. in violation of Sections 8 (3) and (1) of the Act (R. 1641). Forty-one other employees who participated in the strike and were likewise refused reinstatement on June 24, 1937, were subsequently reinstated on various dates between July and October 1937 but were thereafter discharged (R. 1643, 1661). The Board found that both the tardy reinstatement of these men and their subsequent dismissal was based on their membership in the U. A. W. and participation in the strike, and that by such discrimination in regard to hire and tenure of employment petitioner discouraged membership in the Union and violated Sections 8 (3) and (1) of the Act (R. 1643–1645).

Upon the basis of these findings the Board ordered petitioner to cease and desist from its illegal acts; to offer reinstatement to the employees discriminatorily denied reinstatement or discharged and to make them whole for any loss of pay suffer by reason of petitioner's discrimination; upon application, to reinstate all other employees who were on strike on March 23, 1937, and thereafter, with back pay from the date of any refusal of their application for reinstatement pursuant to the order; to restore to the employees who were on strike on March 23, 1937, and who have already been reinstated, their seniority and other rights and privileges; upon request, to bargain collectively with the Union; and to post appropriate notices (R. 1655–1663).

On November 6, 1939, petitioner filed in the court below a petition to set aside the Board's order (R. 2–19). The Board requested enforcement of its order (R. 20–29). On July 3, 1940, the court enforced the Board's order, with certain modifications not here material (R. 1688–1705). Thereafter, a petition for rehearing filed by the company was denied (R. 1711).

ARGUMENT

1. Petitioner contends that the Board exceeded its powers under Section 10 (c) in ordering the reinstatement of the employees who engaged in the sit-down strike. This contention was not urged before the Board by petitioner (see R. 1638), and Section 10 (e) of the Act provides that no objection not urged before the Board shall be considered by the court, unless the failure to urge the objection "shall be excused because of extraordinary circumstances." There is no showing here of any such "extraordinary circumstances." Consequently the contention may not be considered by this Court. Furthermore, the record is silent, and the Board made no finding, as to the identity of the sit-down strikers; doubtless, this was in consequence of petitioner's failure to urge its present contention before the Board. And as the court below pointed out, "petitioner's rights in this respect, if any, would constitute matters of defense to the Board's charge and * * * the burden was upon the petitioner to offer proof in support thereof" (R. 1698).

In any event, the contention that the Board was without power to order the reinstatement of the sit-down strikers under the circumstances of the present case is without merit. The situation here is wholly unlike that presented in *National Labor Relations Board* v. *Fansteel Metallurgical Corporation,* 306 U. S. 240, on which petitioner relies. The *Fansteel* decision went on two grounds: (1) that the employer in that case had exercised its right to discharge employees for illegal conduct engaged in during the strike; (2) that the conduct in which the sit-down strikers and those who aided and abetted them engaged was of so aggravated a character as to make the Board's order of reinstatement an abuse of the Board's discretion. In the latter connection, the opinion of this Court recites that the *Fansteel* strikers remained in occupation of the Company's plant for 9 consecutive days; that they defied a court injunction requiring them to vacate the premises and engaged in two pitched battles with peace officers seeking to enforce the injunction; and that most of the men were eventually fined and given jail sentences for violating the injunction (306 U. S. at 248–249). In addition, *Fansteel's* plant and machinery were damaged during the course of the strike (5 N. L. R. B. 930, 942–943; cf. 306 U. S. at 253).

In the present case, the Board's unchallenged finding is that the sit-down strikers were not discharged. The first ground of decision in the *Fansteel* case is therefore inapplicable. Nor does the

second ground apply. As noted above, petitioner here does not challenge but, indeed, expressly concedes the correctness of the Board's findings as to the facts (Pet. Br. p. 2). These findings, summarized *supra,* pp. 3–4, establish that the entire sit-down episode lasted only 26 hours; that petitioner's officials were not ousted from the plant but had free access thereto at all times; that no damage was done to petitioner's property; that there was no defiance of law officers or violation of any injunction; that the strikers evacuated the plant promptly and peaceably when requested to do so by the police, and that the employees involved were never discharged by petitioner but, on the contrary, were repeatedly asked to return to work and offered substantial inducements to do so.

Nor is there any conflict, as petitioner asserts, with *McNeely & Price Co.* v. *National Labor Relations Board,* 106 F. (2d) 878 (C. C. A. 3d). While there was not, in that case, any explicit discharge of the strikers, as there was in *Fansteel,* neither was there any such degree of affirmative condonation as here. Also, it appears that in the *McNeely & Price* case certain goods were spoiled by neglect during the strikers' occupation of the premises (106 F. (2d) at 880–881), in contrast with the absence of damage to the employer's property here. These differences serve not only to distinguish the case but to show the extent to which each case turns on its facts. Further, the wave of sit-down strikes which swept over the country in

1937 has long since receded, leaving little general importance to the question in what circumstances the Board may order the reinstatement of sit-down strikers.

2. There is no merit in the contention (Pet. 11, Br. 5–8) that there is a fatal variance between the charge and the complaint with respect to the 41 employees found by the Board to have been discharged in violation of the Act following their temporary reinstatement by petitioner. The amended charge (R. 37) alleged that petitioner, in violation of Section 8 (3) of the Act, had "discriminated in regard to hire and tenure of employment and terms and conditions of employment to discourage membership in Local 298 * * *." The employees alleged to have suffered such discrimination were listed in an appendix to the amended charge or in an amendment thereto (R. 38–40, 45); among them were all of the 41 employees in question with the exception of William Fisher, who, petitioner admits (Br. 6), was not discharged until after the filing both of the charge and the complaint. The complaint, for the most part, set forth the allegations of the charge in *haec verba*, but it went into greater detail as to the violation of Section 8 (3) with respect to the 41 employees, by alleging that after these persons had been reinstated, they were further discriminated against by being discharged on account of their union membership and activity. Clearly, there is here no such drastic departure from the charge as petitioner asserts. The com-

plaint set forth no new unfair labor practice; it merely "elaborated the charge with particularity." *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 368; see *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. (2d) 38 (C. C. A. 6th).

3. The Board, having found that the strike was prolonged after March 23, 1937, by petitioner's unfair labor practices, issued its usual order in such cases, requiring the company, upon application, to offer reinstatement to the striking employees, or in the event that no jobs were immediately available, to place such employees upon a preferential list, with back pay from 5 days after the date of application to the date of the offer of reinstatement or placement upon a preferential list. Petitioner does not challenge the appropriateness of this form of remedial order (Pet. 11), but asserts that it was deprived of a "substantial right" by the failure of the Board's complaint to list the individuals as to whom this relief was ordered. Approximately this contention was rejected in *Republic Steel Corp.* v. *National Labor Relations Board,* 107 F. (2d) 472 (C. C. A. 3d). The court said (p. 478):

> Republic further contends that the order for the reinstatement of the strikers was invalid because the complaint did not tender the issue of the reinstatement of the strikers. The complaint did, however, enumerate certain unfair labor practices and allege that because of these practices and of the

> refusal to sign the contract the strike took place. Section 10 (c) of the Act specifically authorizes the Board to direct reinstatement of employees if unfair labor practices are found. Republic was, therefore, sufficiently informed that such action might be required by the Board.

The contention was renewed in the petition for certiorari in precisely the same terms in which it is now urged (Pet. pp. 53–54, No. 707, Oct. Term, 1939), but certiorari was denied (309 U. S. 684; certiorari granted limited to another point, 310 U. S. 655). Numerous other cases in which enforcement has been granted to orders requiring the reinstatement of striking employees, where the strikes were caused or prolonged by unfair labor practices, on the basis of complaints identical in form with the complaint here, are listed in the footnote.[4] There are no contrary decisions.

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[4] *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576; *Black Diamond Steamship Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, 304 U. S. 579; *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 68 (C. C. A. 2d), affirmed, 309 U. S. 629; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3d), certiorari denied, 308 U. S. 605; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254 (C. C. A. 3d), certiorari denied, 308 U. S. 615; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6th), certiorari denied, 308 U. S. 568; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179

CONCLUSION

The decision below is clearly correct and presents neither a conflict of decisions nor any question of substantial public importance. The petition should therefore be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

THOMAS E. HARRIS,
Special Assistant to the Attorney General.

ROBERT B. WATTS,
General Counsel,

LAURENCE A. KNAPP,
Associate General Counsel,

MORTIMER B. WOLF,
BERTRAM EDISES,
Attorneys,
National Labor Relations Board.

DECEMBER 1940.

(C. C. A. 6th); *National Labor Relations Board* v. *Boss Mfg. Co.*, 107 F. (2d) 574, 579 (C. C. A. 7th); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432 (C. C. A. 7th); *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8th); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9th); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9th).

APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V., § 151, *et seq.*):

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1940